

NOAH BRUMFIELD (SBN 203653)  
nbrumfield@whitecase.com  
ELLEN MCGINTY KING (SBN 71490)  
eking@whitecase.com  
JEREMY K. OSTRANDER (SBN 233489)  
jostrander@whitecase.com  
**WHITE & CASE LLP**  
3000 El Camino Real  
Five Palo Alto Square, 9th Floor  
Palo Alto, CA 94306  
Telephone: (650) 213-0300  
Facsimile: (650) 213-8158

Attorneys for Defendant/Counterclaimant  
ELLIE MAE, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DOCMAGIC, INC., a California  
corporation

Plaintiff,

v.

ELLIE MAE, INC., a Delaware  
corporation,

Defendant.

AND RELATED COUNTERCLAIM

Case No. 3:09-CV-4017-MHP

**DECLARATION OF RICHARD ROOF IN  
SUPPORT OF ELLIE MAE INC.'S  
MOTION FOR SUMMARY JUDGMENT  
ON THE FIRST, SECOND AND THIRD  
CLAIMS FOR RELIEF IN THE SECOND  
AMENDED COMPLAINT**

Date: December 27, 2010  
Time: 2:00 p.m.  
Courtroom: 15

Hon. Marilyn Hall Patel

1 I, Richard Roof, declare as follows:

2 1. I am Senior Vice President of Ellie Mae, Inc. ("Ellie Mae"), with responsibility for  
3 business development. I have been employed by Ellie Mae since 1999 and have held the title of  
4 Senior Vice President since approximately 2002. Prior to becoming Senior Vice President for  
5 business development, I was Vice President of business development.

6 2. Unless otherwise indicated, the following facts are based on my personal  
7 knowledge. I would be competent to testify concerning the matters set forth herein if called upon  
8 to do so.

9 **Ellie Mae's Encompass and ePass Connections with Third-Party Vendors**

10 3. Among other things, Ellie Mae provides loan origination software known as  
11 Encompass to mortgage loan brokers and mortgage loan bankers. Ellie Mae also offers these  
12 customers a closing document preparation service known as Ellie Mae Docs. In addition, Ellie  
13 Mae provides an Internet-based platform (described below) which allows Ellie Mae's licensees to  
14 access the websites of providers of other mortgage-related service providers while remaining in  
15 the Encompass software environment. Throughout my employment with Ellie Mae, I have been  
16 directly involved in negotiating with vendors of these other mortgage-related services regarding  
17 their participation as vendors on Ellie Mae's Internet-based platform as well as negotiating other  
18 business relationships with these vendors.

19 4. Vendors that want to sell their services directly to Ellie Mae customers through  
20 Ellie Mae's Internet-based platform can do so by entering into an Electric Bridge Agreement with  
21 Ellie Mae that allows the vendor access to the Ellie Mae Network (also known as "ePASS").  
22 ePASS is an Internet-based platform available only to Ellie Mae customers through which  
23 vendors integrated into ePASS can directly sell their services to the Ellie Mae customers who  
24 choose to use ePASS.

25 5. Vendors that sign the Electronic Bridge Agreement and become integrated with  
26 ePASS include providers of loan underwriting services, compliance and fraud detection services,  
27 mortgage insurance services, appraisal services, and vendors of closing document preparation  
28

1 services, among others. Among other things, the Electronic Bridge Agreements establish the fees  
2 to be paid by the vendor to Ellie Mae for each transaction conducted on ePASS. DocMagic, Inc.  
3 (“DocMagic”) is an example of a vendor of closing document preparation services. The range of  
4 partner-offered services available through ePASS can be found at  
5 [www.elliemae.com/lenders\\_vendors/partners\\_service.asp](http://www.elliemae.com/lenders_vendors/partners_service.asp). Attached hereto as Exhibit A is a true  
6 and correct copy of a printout of this webpage.

7 6. As an example, the other mortgage-related service providers on ePASS include 13  
8 closing document preparation products from 10 vendors (including two of Ellie Mae’s own  
9 document preparation offerings). Attached hereto as Exhibit B is a true and correct copy of a  
10 printout from the Ellie Mae website showing all of the closing document preparation service  
11 vendors that are currently available on ePASS.

#### 12 **DocMagic’s Discounted Access to ePASS**

13 7. For several years, DocMagic was one of the closing document preparation vendors  
14 that participated on ePASS. DocMagic’s earliest participation was governed by the terms of an  
15 Electronic Bridge Agreement Between Ellie Mae and Participator, entered into by Ellie Mae and  
16 DocMagic on November 24, 2003. A true and correct copy of that agreement (the “DocMagic  
17 Bridge Agreement”) is attached hereto as Exhibit C. The DocMagic Bridge Agreement was  
18 modified in September 2006. A true and correct copy of Amendment Number One to Electronic  
19 Bridge Agreement Between Ellie Mae and Participator is attached hereto as Exhibit D. By its  
20 terms as amended, the DocMagic Bridge Agreement was due to expire as of August 31, 2009.  
21 Both the original and amended terms of the DocMagic Bridge Agreement applied to DocMagic’s  
22 provision of sets of closing documents, but not to any other DocMagic product or service. Both  
23 the original and amended terms of the DocMagic Bridge Agreement provided DocMagic with  
24 discounted pricing for access to ePASS that was substantially less than the standard terms offered  
25 to other closing document preparation vendors.

26 8. During the period covered by the DocMagic Bridge Agreement, Ellie Mae and  
27 DocMagic had a broader relationship that included, at various times, an Integration and ePASS  
28 Business Center Agreement, a Strategic Partnership Agreement and a Reseller Agreement, in

1 which DocMagic agreed to provide Ellie Mae services beyond those included in the Electronic  
 2 Bridge Agreement. In the context of that broader relationship, the original pricing of the  
 3 DocMagic Bridge Agreement was set at graduated rates for each transaction involving a set of  
 4 closing documents. See Exhibit C at p. 12, ¶ 2(b). The amended ePASS rates set in 2006 also set  
 5 graduated rates (Exhibit D at p. 7, ¶ 2) that were established in conjunction with termination of  
 6 the Strategic Partnership Agreement and concurrent entry into the Reseller Agreement, which was  
 7 entered into at the same time as the 2006 DocMagic Bridge Agreement. Attached hereto as  
 8 Exhibit E is a true and correct copy of the Reseller Agreement (the “DocMagic Reseller  
 9 Agreement”).

10 **Ellie Mae’s Offer to Deal with DocMagic on the Same Terms Offered to and**  
 11 **Agreed to by DocMagic’s Competitors**

12 9. I understand DocMagic alleges that Ellie Mae began in the Spring of 2009 to craft  
 13 a strategy to monopolize the “closing document market” by blocking DocMagic’s ability to sell to  
 14 Ellie Mae’s Encompass customers by (i) unilaterally terminating the DocMagic Reseller  
 15 Agreement whereby Ellie Mae resold DocMagic’s closing document services, and (ii)  
 16 conditioning the continued right to access Ellie Mae’s proprietary ePASS network upon the  
 17 payment by DocMagic of a “non-negotiable” 600% price increase in the per transaction license  
 18 fee, an increase that allegedly “bears no relationship” to what Ellie Mae charges other closing  
 19 document vendors for access to ePASS. These allegations are not correct.

20 10. First, the termination of the DocMagic Reseller Agreement was mutual. The  
 21 parties mailed their respective notices of termination within one day of each other. The notice of  
 22 termination that Ellie Mae received from DocMagic was dated one day after the date that Ellie  
 23 Mae mailed its own notice of termination. Attached hereto as Exhibits F and G, respectively, are  
 24 copies of the notice letters sent by Ellie Mae and by DocMagic within one day of each other.

25 11. Second, Ellie Mae chose not to renew the DocMagic license to ePASS under the  
 26 then-existing terms of the DocMagic Bridge Agreement because DocMagic was receiving a very  
 27 favorable discount relative to other vendors that was no longer warranted given the parties’  
 28 mutual termination of the DocMagic Reseller Agreement.

- a. The three-year term of the amended DocMagic Bridge Agreement was due to expire as of August 31, 2009. By the spring of 2009, Ellie Mae was no longer willing to allow DocMagic to remain on ePASS under the very favorable terms it had enjoyed, at rates substantially less than those charged to other closing document preparation vendors on ePASS.
- b. On May 21, 2009, I notified DocMagic of Ellie Mae's notice of intent to terminate the DocMagic Bridge Agreement ("Notice"). I drafted the Notice to include a statement indicating Ellie Mae's intent to renegotiate the terms of the ePASS license at then-standard terms.
- c. Attached hereto as Exhibit H is a true and correct copy of the May 21, 2009 letter that I sent to DocMagic's CEO, Don Iannitti.
- d. Ellie Mae's May 21 letter to DocMagic stated: "We are taking this action because the transaction fee amounts that you are currently paying are significantly discounted from our normal fees. If you would like to discuss this, please let me know."
- e. I drafted this May 21 Notice, and the above quoted sentence in particular, as an invitation to DocMagic to enter into negotiations with Ellie Mae on new terms. The Notice effectively gave DocMagic three (3) months in which to do so, telling Mr. Iannitti "[d]o not hesitate to contact me if you have any questions or comments."

12. Ellie Mae was willing to negotiate a new Electronic Bridge Agreement with DocMagic, and I personally communicated Ellie Mae's willingness to do so on June 5, 2009, approximately two weeks after the May 21 notice letter, during a conference call with Don Iannitti and Bill Lambropoulos, the CEO and in-house counsel for DocMagic, respectively .

13. During the June 5 call, I told Mr. Iannitti and Mr. Lambropoulos that Ellie Mae could not continue with the ePASS relationship under the then-existing terms because, under the pricing in the DocMagic Bridge Agreement, DocMagic was getting a very heavy discount off Ellie Mae's standard price for ePASS closing document preparation vendors. In response to an

1 inquiry from Mr. Iannitti, I told him that Ellie Mae's standard price was \$6.00 per transaction for  
2 closing documents.

3 14. The DocMagic representatives indicated that they would consider this pricing and  
4 get back to me. However, neither during this June 5, 2009 conference call nor at any time since  
5 then did DocMagic ever communicate a counter-offer or attempt to negotiate a lower price. The  
6 conversation on June 5, 2009 was the last time that I have ever heard from DocMagic regarding  
7 pricing for a new Electronic Bridge Agreement.

8 **Ellie Mae's Standard ePASS Rate**

9 15. Ellie Mae works with many vendors in a variety of service categories, including  
10 closing document preparation services. All vendors who wish to participate on ePASS are  
11 required to execute an Electronic Bridge Agreement that defines the relationship between Ellie  
12 Mae and the vendor, as well as their respective rights. Ellie Mae maintains a list of standard  
13 transaction fees that apply to all categories of vendors on ePASS.

14 16. The Ellie Mae offer to deal at \$6.00/transaction for closing document preparation  
15 vendors was at the standard rate. The \$6.00/transaction fee has been the standard rate for that  
16 vendor category for many years.

17 17. The price list maintained by Ellie Mae requires payment of \$6.00 per transaction  
18 for closing document preparation vendors. This price has remained unchanged for at least the last  
19 three years or longer. A true and correct copy of Ellie Mae's price list is attached at Exhibit I  
20 (redacted with regard to services not at issue in this dispute).

21 18. The \$6.00 per transaction fee was not a new fee when Ellie Mae made the offer to  
22 deal with DocMagic at \$6.00 in the Summer of 2009. The DocMagic Bridge Agreement entered  
23 in November 2003 also reflected that \$6.00/transaction was the standard transaction rate for  
24 closing document vendors. See Exhibit C at p. 12, ¶ 2.b. There, the \$6.00 fee per document set  
25 was stricken from the fee schedule and the words "Revised Pricing for DocMagic" were inserted.  
26 Even as recently as 2007 – two years before I drafted Ellie Mae's notice of its intent to terminate  
27 the then-existing DocMagic Bridge Agreement and made the offer to renew the agreement at  
28

1 \$6.00/transaction – Ellie Mae had been offering, and competitors to DocMagic had been  
2 accepting, the \$6.00 per transaction rate.

3 19. For example, there are two closing document service vendors who entered into  
4 new or amended Electronic Bridge Agreements in 2007. In each case, Ellie Mae and the vendor  
5 agreed that the closing document fee payable by the vendor would be \$6.00 per transaction.

6 20. Other closing document preparation vendors on ePASS also pay \$6.00 per  
7 transaction, the standard rate. There are currently nine third-party closing document preparation  
8 vendors who participate on ePASS: Accurate Document Services; CoreLogic Document Services  
9 (First American Nationwide Documents); DocsDirect (Schwartz & Associates); DocuTech; IDS,  
10 Inc.; MRG Document Technologies (Middleberg, Riddle & Gianna); Peirson Patterson LLP;  
11 ProClose (Mortgage Banking Systems); and Robertson & Anschutz. See Exhibit A. Of these,  
12 eight vendors have a single contractual relationship with Ellie Mae, *i.e.*, their only contract with  
13 Ellie Mae is an Electronic Bridge Agreement. Seven of these eight vendors are required by  
14 contract to pay Ellie Mae *at least* \$6.00 per transaction on ePASS.

15 21. The eighth vendor pays \$5.00 per transaction, but is subject to a minimum  
16 payment obligation of \$1,500 per month under an amended agreement dated as of September  
17 2006.

18 22. The ninth closing document preparation vendor receives a pricing discount  
19 because it has a much more complex, multi-agreement relationship with Ellie Mae and gives Ellie  
20 Mae a preferential discount on services offered to Ellie Mae. Its initial pricing for ePASS was  
21 originally set in 2001 at 20% of gross revenue from ePASS transactions, which was equivalent to  
22 approximately \$6.00 or more per transaction, rather than an absolute dollar figure. The rate for  
23 that vendor was subsequently changed in 2006 in conjunction with the expansion of the  
24 relationship to include a reseller relationship and settlement of a billing dispute. Any discount  
25 given to this vendor is offset by an equal, if not greater, net discount in prices paid by Ellie Mae  
26 for services offered by the vendor.

**DocMagic's Claimed "Injury," if any, is Self-Inflicted**

23. I understand DocMagic claims that the ability to have a direct connection to Ellie Mae's customer loan data through Ellie Mae's software is essential to DocMagic. This is not reflected in DocMagic's actions.

24. Prior to the Summer of 2009, DocMagic generated most of its sales to Encompass users through the reseller arrangement, as compared with sales through ePASS. Since DocMagic mutually terminated the reseller agreement, DocMagic's loss of sales through the DocMagic Reseller Agreement was self-inflicted.

25. Because DocMagic would not negotiate terms for a new Electronic Bridge Agreement during the Summer of 2009, the DocMagic Bridge Agreement expired and DocMagic no longer was a participant on ePASS.

**DocMagic Knew in the Summer of 2009 and Well Before This Litigation that It Would Cease to Have Encompass Connectivity**

26. DocMagic has known since the Ellie Mae Notice given to DocMagic, dated May 21, 2009, that DocMagic would no longer have a license to connect to ePASS unless it negotiated a new agreement.

27. By the end of August 2009, DocMagic's ePASS agreement had terminated without any effort by DocMagic to renegotiate a continuing agreement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 19th day of November, 2010.

/s/ Richard Roof



**ATTESTATION OF E-FILED SIGNATURE**

I, Ellen McGinty King, am the ECF User whose ID and Password are being used to file this Declaration. In compliance with General Order 45, X.B., I hereby attest that Richard Roof has concurred in this filing.

Dated: November 19, 2010

/s/ Ellen McGinty King  
Ellen McGinty King